79209-7

No. 34039-9-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

GENE CHAMPAGNE, CARY BROWN, ROLAND KNORR, and CHRISTOPHER SCANLON, Appellants,

v.

THURSTON COUNTY, Respondent.

REPLY BRIEF OF APPELLANTS

Will Aitchison, WSBA #32658
Mark Crabtree, *pro hac vice*
Aitchison & Vick
3021 NE Broadway
Portland, OR 97232
(503) 282-6160

Attorneys for Appellants Champagne, Brown, Knorr and Scanlon

TABLE OF AUTHORITIES

Cases

Statutes

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

Other Authorities

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

I. INTRODUCTION

In their opening brief, Plaintiff-Appellants ("Plaintiffs") identified why the Washington statute that has the effect of waiving a public entity's immunity from common law tort claims has no application with respect to claims brought under a separate and distinct statutory scheme; in this case, Washington's wage and hour statutes. Such a conclusion is compelled because Washington's Tort Claims Act, RCW Ch. 4.92, does not provide the basis for Plaintiffs' suit – Plaintiffs' claims arise out of violations of the Minimum Wage Act, the Wage Payment Act, and the Wage Rebate Act – and, therefore, the Tort Claim Act's limitations on suit, including the requirement that a plaintiff first file a claim notice with a public entity, simply do not apply. This conclusion is further supported by the fact that Washington's Tort Claims Act has never, prior to the trial court's ruling at summary judgment in this case, been interpreted by Washington courts to apply outside the context of common law tort and breach of contract claims. Despite the disconnect between applying the Tort Claim Act's notice requirements to claims that do not arise under that Act, the trial court concluded that the Act's reference to "all claims for damages" encompasses, literally, all claims, including Plaintiffs' statutory claims. This ruling was in error.

In opposition to Plaintiffs' opening brief Defendant-Respondent Thurston County ("Defendant" or "County") repeats the arguments

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

made in support of its application for summary judgment and restates the reasoning adopted by the trial court at summary judgment. In summary, Defendant makes the following three familiar arguments:

- RCW 46.45.010 and .020's use of the phrase "all claims for damages" mandates that statutory wage and hour claims comply with the pre-filing notice requirements in the Tort Claims Act.
- The Washington Legislature's specific intent in amending RCW 36.45.010 in 1993 was to impose uniform procedural requirements, including pre-filing notice requirements, for bringing *any and all* claims for damages against a county.
- Even statutory wage claims are claims based upon an "implied contract," and Plaintiffs' claims under the Minimum Wage Act, Wage Rebate Act, and Wage Payment Act are nothing more than implied contract claims for which *Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 84 P.3d 1241 (2004), held were included within the pre-filing requirements of the Tort Claims Act.

As set forth in this Reply memorandum, Plaintiffs believe that Defendant's first argument ignores the context and scope of the Tort Claims Act and Defendant's reading of the statute would broaden the scope of the Tort Claims Act beyond that contemplated by the Washington Legislature. Defendant's second argument misstates the intent of the 1993 Legislature in amending the Tort Claims Act and,

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

once again, impermissibly broadens the scope of the Tort Claims Act beyond that previously contemplated. Defendant's third argument misstates Plaintiffs' cause of action and impermissibly attempts to rewrite Plaintiffs' contract of employment to include statutory time of payment requirements. The trial court erred when it adopted one or more of Defendant's arguments and granted Defendant's motion for summary judgment.

II. ARGUMENT

A. Defendant's "Plain Language" Argument Ignores the Scope and Context of Washington's Tort Claims Act.

Washington's Tort Claims Act, RCW 4.96.010, states in part that "[f]iling a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages." RCW 4.96.020 states in part that "[a]ll claims for damages against a local governmental entity" shall be presented to the local government entity. Defendant asserts that the respective references to "all claims for damages" are to be read literally and without regard to the scope of the Tort Claims Act itself. Under this reading, Defendant asserts that any damages claim against a county, including Plaintiffs' statutory wage claims, must comply with the Tort Claim Act's procedural requirements, including the requirement that Plaintiffs first file a claim notice with the County. Defendant overstates the scope and impact of RCW Chapter 4.96.

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

Under Washington rules of statutory construction, courts interpret a statute "to ascertain and give effect to its underlying policy and intent." *Department of Licensing v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002). To determine particular intent, courts look first to the language of the provision and the context in which the statute is found, as well as the entire statutory scheme. *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). "[T]he court must read the statute as a whole; 'intent is not to be determined by a single sentence.'" *Service Employees Intern. Union, Local 6 v. Superintendent of Public Instruction*, 104 Wn.2d 344, 348-49, 705 P.2d 776 (1985). Moreover, "[t]he *Act* must be construed as a whole . . . [and] all of the provisions of the Act must be considered in their relation to each other . . . ." *Tommy P. v. Board of County Comm'rs of Spokane County*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982) (emphasis added). When taking into account each of these particulars, courts "will avoid a literal reading of a provision if it would result in unlikely, absurd, or strained consequences." *Cannon*, 147 Wn.2d at 57.

Here, taking into account the context and history of the Tort Claims Act, the scope of the Act cannot be as broad as Defendant asserts. As set forth in Plaintiffs' opening brief, the Tort Claims Act was enacted for the purposes of waiving the government's sovereign immunity from tort claims. Rather than waive immunity entirely, in the Tort Claims Act the Legislature has placed conditions and

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

restrictions on bringing claims against the State and its political subdivisions for those claims to which the partial waiver applies. *See* RCW 4.96.020. In *Harberd v. City of Kettle Falls*, the court concluded that the Tort Claims Act's claim filing provisions apply not only to tort claims, but also common law breach of contract claims, 120 Wn. App. at 510; a conclusion which is consistent with public policy and the Washington Supreme Court's determination that grants of immunity to the State and governing bodies (including immunity on contracts) are not allowed. *See Howe v. Douglas County*, 146 Wn.2d 183, 190-91, 43 P.3d 1240 (2002).

The scope of the Tort Claims Act, therefore, is defined by the type of claim brought against the governmental entity. A tort claim is permitted by operation of the Tort Claim Act's waiver of immunity, but it is also subject to the procedural requirements contained within the Act. A statutory cause of action, by contract, in which the Legislature has waived immunity from suit not through operation of the Tort Claims Act, but by including the government within the substantive statute's coverage, does not depend upon the Tort Claim Act's waiver of immunity and, as a result, the government cannot use the procedural requirements in the Act as a conditional prerequisite to being sued.

Thus, when one reads the Tort Claims Act in context, its plain language clearly extends the notice requirements in RCW 4.96.020

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

only to tort claims and common law breach of contract claims. Specifically, RCW 4.96.010's requirement that "[f]iling a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages" simply expands upon the preceding sentence, which reads in full:

> "All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation."

RCW 4.96.010 (emphasis added). Similarly, RCW 4.96.020's requirement that "[a]ll claims for damages against a local governmental entity" shall be presented to the local government entity, is clarified by the same statute's later references to "claims for damages arising out of tortious conduct." RCW 4.96.020(3) & (4) (emphasis added). When the Tort Claims Act is read as a whole and all of the provisions of the Act considered in relation to each other, its scope does not extend to the statutory wage and hour claims brought by Plaintiffs. As such, the procedural requirements in the Act do not apply to Plaintiffs and the trial court erred when it dismissed Plaintiffs' claims for failing to comply with the Act's notice requirements.

The interpretation that Defendant sets forth would also result in just the sort of unlikely, absurd, and strained consequences that the

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

Cannon court cautioned against. It can hardly be in dispute that the Legislature did not actually intend to extend the Tort Claim Act's notice requirement to "all" claims for damages. This must be so because there exist numerous examples of damage actions for which the claim notice provisions in RCW 4.96.020 simply do not apply, either because their application would be problematic or irreconcilable with the underlying substantive cause of action. Examples of causes of action for which everyone would agree do not require the filing of a claim notice prior to a claim for damages are:

- Class Action plaintiffs. According to *Oda v. State*, 111 Wn. App. 79, 88, 44 P.3d 8, *rev. den.*, 147 Wn.2d 1018, 56 P.3d 992 (2002), class certification and class action members' claims "may not be defeated by the fact that the claimants to be added as plaintiffs have not previously filed a tort claim." Thus, the Tort Claim Act's notice requirements do *not* apply to class members' claims, even where the underlying claim sounds in tort. Outside of the tort context, no Washington court has ever indicated that the representative plaintiffs, much less the class members, are required to file a claim notice. *See, e.g., Mader v. Health Care Auth.*, 149 Wn.2d 458, 70 P.3d 931 (2003) (no requirement on representatives of class claiming violation of Health Care Authority's rules regarding coverage of state-paid health benefits to file claim notice with state).

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

- Federal claims. Wage and hour claims under the Fair Labor Standards Act ("FLSA") – whether brought in state or federal court – are allowed to proceed regardless of whether the plaintiff complies with claim-notice provisions. *See Felder v. Casey*, 487 U.S. 131, 147 (1988) (state may not place conditions on the vindication of a federal right); *Middleton v. Hartman*, 45 P.3d 721, 733 (Colo. 2002) (state notice-of-claim provisions are preempted by the FLSA). *Accord Tift v. Professional Nursing Services, Inc.*, 76 Wn. App. 577, 583, 886 P.2d 1158 (1995) ("[T]he MWA is based upon the Federal Fair Labor Standards Act . . . .").
- Civil Service Appeals. RCW 41.06.170 sets forth detailed procedures on employees covered by the State Civil Service Laws who wish to challenge a dismissal, suspension, or demotion. The nature of such an appeal often includes a back-pay component in which the employee seeks damages against his or her employer. The appeal process itself makes no allowance for the filing of a tort claim notice, and such a procedure would be antagonistic to the strict time requirements set forth in RCW Chapter 41.06.

The examples above illustrate the flaw in Defendant's argument and the error in the trial court's ruling below. The Washington Legislature could not have literally meant that "all claims for

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

damages" are subject to the Tort Claims Act. The various exceptions noted above begin to swallow the rule that Defendant proposes. When viewed in the appropriate context, the Tort Claim Act's reference to "all claims" clearly encompasses the Legislature's intent to address all *tort*-based claims. The Act was never intended to extend beyond those claims for which the underlying waiver of sovereign immunity within the Act itself exists.

B. The 1993 Legislature's Intent in Amending the Tort Claims Act Was to Assemble Scattered Claim Notice Statutes in One Act; Not to Extend the Act's Provisions to All Types of Damage Claims Against a County.

Defendant argues that RCW Chapter 4.96's proper scope must extend to "all" claims against a county because the Washington Legislature's 1993 amendments were, according to Defendant, for the express purpose of "provid[ing] a single, uniform procedure for bringing a claim for damages against a local governmental entity." 1993 Laws, Ch. 449 § 1. Defendant argues that the 1993 Legislature "made it clear" that the amendments were for the purpose of extending the Tort Claim Act's procedural requirements to all claims against a public entity because, to do otherwise, would create confusion and uncertainty for a litigant. Resp. Brief, at 9.

In House Bill 1218, the Legislature's intent was not to create a uniform pre-filing notice requirement for all litigants for all types of claims, but rather to simply consolidate the numerous pre-1993

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

procedures for filing *tort* claims against governmental entities into one statute. Prior to 1993, claims-filing procedures were scattered among various statutes. RCW 36.31 governed the procedures for presenting a tort claim against charter cities; former RCW 36.45 governed tort claims against counties; former RCW 4.96.020(2) set out the procedures for other political subdivisions and municipal corporations; and former RCW 35A.31.010-.030 established the procedures for tort claims against code cities. In 1993, the Legislature consolidated all of these procedures into one under RCW 4.96.020. Laws of 1993, Ch. 449 § 3; *see Wilson v. City of Seattle*, 122 Wn.2d 814, 819 n.1, 863 P.2d 1336 (1993)[1].

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[1] Respondent criticizes Plaintiffs' reliance on *Wilson* because the case was brought prior to 1993 and the effective date of House Bill 1218. However, the *Wilson* court specifically addressed this concern, finding that the 1993 amendments to RCW 4.96.010 and .020 had no impact on the question of whether the plaintiff was required to file a claim notice with the City prior to bringing statutory action against the municipality for its delay in processing land use permit application. *See id.* at 819, n.1. ("These 1993 amendments do not affect our analysis in this case.").

Respondent also argues that *Wilson* is inapplicable because the City of Seattle sought to dismiss the *Wilson* plaintiff's action for his failure to file a claim notice pursuant to a City ordinance, rather than RCW Chapter 4.96. This argument is based upon a misunderstanding of the court's reasoning in *Wilson*. The court found that the City ordinance could not prevent the plaintiff from bringing a statutory cause of action because the City ordinance was broader in scope than that of the Tort Claims Act. *Id.* at 823 *(cont. next page)*

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

Rather than broadening the scope of the Tort Claims Act to encompass all claims, the *scope* of the Act remained the same, and the Legislature simply consolidated numerous statutes that contained that same scope: *i.e.*, tort-based claims. There is nothing in the statute or legislative history to suggest that the 1993 Legislature intended to make claims not previously subject to the notice requirements in the Tort Claims Act subject to a new procedural requirement. The underlying purpose of the Tort Claims Act remained that of waiving the government's sovereign immunity from torts and placing conditions on that waiver. After 1993, the Tort Claims Act and its consolidated procedures continue to apply only to those claims for which sovereign immunity has been waived by operation of the Act.

("RCW 4.96.010 does not authorize Seattle to apply SMC 5.24.005 to [statutory causes of action]."). To reach this conclusion, the *Wilson* court first had to find that the RCW Chapter 4.92 "authorizes the filing of a claim for damages arising from tortious conduct as a condition precedent to bringing a suit, but not for other types of damages claims such as RCW 64.40.020." *Id.* at 823-24; *see also id.* at 821 n.2 ("This analysis is also consistent with the Legislature' recent consolidation of these statutes into one set of procedures for filing claims. *See* Laws of 1993, ch. 449, § 3."). Accordingly, the Washington Supreme Court's position on the applicability of the Tort Claims Act to statutory causes of action is entirely relevant, if not controlling, to the issue now before this Court.

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

C. Statutory Causes of Action Are Not Based Upon a Contract.

Finally, Defendant argues that the debate over whether or not the Tort Claims Act applies to statutory causes of action is irrelevant because Plaintiffs' claims are, in actuality, claims based upon an "implied contract." Resp. Brief, at 13 (citing *SPEEA v. Boeing Co.*, 139 Wn.2d 824, 837-38, 991 P.2d 1126 (2000)). Coupled with the fact that the court in *Harberd* held contract claims are subject to the notice requirements in RCW 4.96.020, Defendant argues that Plaintiffs' statutory wage claims are subsumed within the requirement that implied contract claims first be presented to the County in accordance with RCW 4.96.020.

Defendant's "implied contract" theory is unpersuasive. In *SPEEA*, the court was confronted with the question of the appropriate statute of limitations for claims brought under the Washington Minimum Wage Act. The court differentiated between claims based upon written contracts, claims based upon torts and tort-like claims, and claims involving unjust enrichment in determining the applicable statute of limitations period for claims under Washington's Minimum Wage Act. *See* 139 Wn.2d at 837-38. The court rejected a six-year statute of limitations because the defendant did not enter into a written contract with the employees. The court rejected a three-year statute of limitations predicated upon a tort, specifically "declin[ing] to adopt the employees' suggestion that a claim under the WMWA is akin to a civil

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

rights action or tort action." *Id.* at 837. The court, however, found that a three-year statute of limitations was appropriate because "WMWA claims are more analogous to claims for unjust enrichment than to tort claims" and "Washington case law has applied a three-year statute of limitations to claims involving unjust enrichment." *Id.* at 837-38.

The statute-of-limitations analysis in *SPEEA* is inapplicable to determining whether Plaintiffs' claims are based upon a contract for purposes of the Tort Claims Act. The court had no occasion to rule that statutory wage and hour claims are in fact contract claims for purposes of the Tort Claims Act. Rather, had the *SPEEA* court been presented with a claim against a public employer, the court would presumably have performed the same analysis advocated by Plaintiffs in their opening brief, which requires the court to make the following determinations:

1. What is the nature of the underlying claim?
2. In what manner did the governmental entity waive its immunity from suit on the underlying claim?
3. Was the governmental entity's waiver of immunity conditioned upon any procedural pre-filing requirements?

In the case of the *SPEEA* plaintiffs' claims under the Minimum Wage Act, had the claims been against their governmental employer, the employer's waiver of immunity came by way of the Legislature's enactment of the Minimum Wage Act, which contains no procedural

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

requirements prior to bringing suit. If, however, the plaintiffs' claims had been based upon a breach of a written contract claim against a public employer, with no reference to the Minimum Wage Act, the waiver of immunity from suit would come by way of the Tort Claims Act and the plaintiffs would have been required to file a claim notice pursuant to RCW 4.96.020.

Here, Plaintiffs' claims are based solely on the rights given to them under WAC 296-128-035 and the statutory enforcement provisions in the Minimum Wage Act, Wage Payment Act, and Wage Rebate Act. Nothing in the parties' contract states or implies that the time-of-payment requirements contained in WAC 296-128-035 govern Plaintiffs' employment relationship with the County. As such, Plaintiffs' claims are controlled by the pre-filing requirements under the respective wage statutes. Because none of those statutes actually contain a pre-filing notice requirement for a claim brought against a County, the trial court erred when it dismissed Plaintiffs' claims on that basis.

III. CONCLUSION

For the reasons set forth above and in Plaintiffs' opening brief, the trial court's erroneous ruling at summary judgment that had the effect of dismissing Plaintiffs' claims for failing to file a claim notice as required by the Tort Claims Act should be reversed and this case remanded for further proceedings.

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

Dated this 17th day of May, 2006.

Respectfully submitted,

Will Aitchison, WSBA #
Mark Crabtree, *pro hac vice*
Aitchison & Vick
3021 NE Broadway
Portland, OR 97224
(503) 282-6160
Of Attorneys for the Appellants

Aitchison & Vick, Inc.
3021 NE Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877

Case No. 34039-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GENE CHAMPAGNE, CARY BROWN, ROLAND KNORR, and CHRISTOPHER SCANLON, individually and as representative of a class,	**Thurston County No. 04-2-01990-4**
Appellants,	CERTIFICATE OF SERVICE
v.	
THURSTON COUNTY, a political subdivision of the State of Washington,	
Respondent.	

I hereby declare under penalty of perjury according to the laws of the State of Washington that on this date I have caused a true and correct copy of Appellants' Reply Brief to be sent by Federal Express, overnight delivery, to the following:

Douglas E. Smith
Lane Powell Spears Lubersky LLP
1420 5th Ave., Ste. 4100
Seattle, WA 98101

Jeff Fancher
Thurston County
2424 Evergreen Park Dr SW, Ste 102
Olympia, WA 98502

Executed in Portland, Oregon this 17th day of May, 2006.

Carol Green

Carol Green

Aitchison & Vick, Inc.
3021 N.E. Broadway
Portland, OR 97232
(503) 282-6160 Fax: (503) 282-5877